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No. 04-905

In the Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,

Petitioner,

v.

REEDER-SIMCO GMC, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE

The National Automobile Dealers Association ("NADA") is a non-profit national trade association of new motor vehicle dealers.[1] NADA has over 20,000 members and represents over 43,000 separate franchises located in all 50 states. NADA's American Truck Dealers division has a membership of 2,299 franchised medium- and heavy-duty truck dealers, which comprises 88% of all such dealers in the United States.

NADA appears frequently as amicus curiae in cases that raise important issues to its members or their customers. Previously, NADA has filed amicus curiae briefs in this Court in cases involving federal antitrust laws, *State Oil Co. v. Khan*, 522 U.S. 3 (1997), state franchise laws, *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), and federal consumer laws, *Koons Buick Pontiac GMC, Inc. v. Nigh*, No. 03-377, 2004 U.S. LEXIS 7979 (Nov. 30, 2004). In addition, NADA has appeared as amicus curiae in numerous cases in other state and federal courts. NADA's involvement in monitoring the development, enactment, amendment, enforcement and interpretation of federal and state statutes that affect its members provides it with tangible experience and a unique perspective from which to assist a court regarding the application of these statutes. The Robinson-Patman Act, which is the subject of this lawsuit, is one such statute.

The issues in this case directly affect NADA's heavy-duty truck dealer members who compete in the same product market

[1] By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief. Pursuant to Rule 37.6 of the Rules of this Court, counsel for amicus curiae states that no counsel for any party authored this brief in whole or in part and that no person or entity other than amicus curiae, its members or its counsel has made a monetary contribution to the preparation or submission of this brief.

as respondent Reeder-Simco GMC, Inc. ("Reeder"). These members have an obvious and vital interest in the outcome of this case. The same is true for NADA's other members, including those who sell automobiles and light- and medium-duty trucks, each of whom rely on the Robinson-Patman Act to ensure an opportunity to compete on an equal playing field with their competitors.

In this case, the Court of Appeals for the Eighth Circuit held that Reeder presented sufficient evidence to support the jury's verdict that petitioner Volvo Trucks North America, Inc. ("Volvo") discriminated against it in pricing for the purpose of eliminating it as a Volvo dealer. NADA and its members have a significant interest in ensuring that the courts prohibit motor vehicle manufacturers from using price discrimination as a way to circumvent federal and state laws that protect dealers from franchise terminations without good cause. Because dealers are small businesses relative to their manufacturers and because dealers rely on their manufacturers for their sole supply of new cars and trucks, they depend on the Robinson-Patman Act to supplement the laws that Congress and state legislatures have enacted to protect them "from perceived abusive and oppressive acts by the manufacturers." *Orrin W. Fox*, 439 U.S. at 100.

As a national trade association representing numerous competitors in the automobile and heavy-duty truck retail sales and service market, NADA can assist the Court in understanding the effects of price discrimination on competition generally as well as its effects on individual competitors and consumers in the market. In short, NADA is in a unique position to comment on Volvo's contention that its discriminatory pricing practices are neither anticompetitive nor within the reach of the Robinson-Patman Act.

STATEMENT OF THE CASE

A. Statutory Background

Congress enacted the Robinson-Patman Act ("RPA") in 1936 as an amendment to § 2 of the Clayton Act. Robinson-Patman Act, ch. 592, 49 Stat. 1526 (1936). The RPA has been codified in 15 U.S.C. § 13. In short, under the RPA it is unlawful to discriminate in price if that discrimination has a "reasonable possibility" of harming competition between favored and disfavored purchasers and if that discrimination falls outside one of the defenses enumerated in the statute. *See Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434-35 (1983); *see also* 15 U.S.C. § 13(b).

The so-called "jurisdictional elements" of a § 2(a) violation are as follows: "(1) the sale must be in interstate commerce; (2) there must be a difference in price; (3) the discrimination must be 'between different purchasers,' *i.e.*, it must involve more than one purchase from the same seller; (4) the sale must be of goods or commodities; (5) the commodities sold must be of like grade and quality; and (6) the commodities must be sold for use, consumption or resale within the United States or its territories." 3 EARL W. KINTNER & JOSEPH P. BAUER, FEDERAL ANTITRUST LAW § 20.2 (1983).

In addition to proving these jurisdictional elements, an RPA plaintiff "must show . . . a *reasonable possibility* that a price difference *may* harm competition." *Vanco Beverage*, 460 U.S. at 434-35 (emphasis added). However, this showing "does not 'require that the discriminations must in fact have harmed competition.'" *Id.* at 435 (quoting *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981)); *see also Corn Products Refining Co. v. Federal Trade Comm'n*, 324 U.S. 726, 742 (1945)). This reasonable possibility of harm is

often referred to as competitive injury. *Vanco Beverage*, 460 U.S. at 435. A competitive injury may be shown by inference "by proof of a substantial price discrimination between competing purchasers over time." *Vanco Beverage*, 460 U.S. at 435 (citing *Federal Trade Comm'n v. Morton Salt*, 334 U.S. 37, 50-51 (1948)). "In the absence of direct evidence of displaced sales, this inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Vanco Beverage*, 460 U.S. at 435.

If an RPA plaintiff establishes the jurisdictional and competitive injury elements, a violation of § 2(a) exists unless the defendant proves one of the RPA's affirmative defenses. *Id.* Nevertheless, in order to recover damages for an RPA violation, a plaintiff must also make "some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne*, 451 U.S. at 562; *see also* 15 U.S.C. § 15. An actual or antitrust injury may be established "'as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes.'" *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969) (quoting *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946)); *see also J. Truett Payne*, 451 U.S. at 565.

B. The Decision Below

The Court of Appeals for the Eighth Circuit held that Reeder presented sufficient evidence to sustain the jury's verdict that an RPA violation had occurred and that the violation caused injury to Reeder's business. *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701, 711-15 (8th Cir. 2004); Pet. App. at 14a-22a. The Eighth Circuit held further that Reeder

showed that on several occasions it had purchased trucks from Volvo at prices substantially higher than Volvo charged other Volvo dealers for trucks of like grade and quality in reasonably contemporaneous sales. *Reeder-Simco*, 374 F.3d at 712; Pet. App. 16a. Volvo does not challenge this finding. Instead, Volvo challenges the Eighth Circuit's conclusion that sufficient evidence existed to sustain the jury's verdict as to competitive injury and antitrust injury.

As to competitive injury, the Eighth Circuit concluded that Reeder competed with price-favored Volvo dealers at the same functional level of distribution and within the same relevant geographic market. *Reeder-Simco*, 374 F.3d at 709; Pet. App. at 11a. The Eighth Circuit determined that Reeder had established a reasonable possibility of injury to competition on the basis of actual lost sales and profits that had been diverted to the favored Volvo dealers and because Volvo failed to rebut the presumption of competitive injury that arose from Reeder's evidence of "substantial price discrimination between competing purchasers over time." *Reeder-Simco*, 374 F.3d at 713; Pet. App. at 18a; *see also Vanco Beverage,* 460 U.S. at 435; *Morton Salt*, 334 U.S. at 50-51.

As to antitrust injury, the Eighth Circuit relied on evidence of at least one diverted sale and evidence that Reeder's sales and profits declined significantly during the period of Volvo's price discrimination, even though the industry as a whole was enjoying record sales and profits and even though Reeder was making greater efforts to sell Volvo heavy trucks. *Reeder-Simco*, 374 F.3d at 712-14; Pet. App. 17a-19a; *see also Zenith Radio*, 395 U.S. at 123-24; *Bigelow*, 327 U.S. at 264.

Volvo attacks the Eighth Circuit for upholding the jury's determination of competitive injury and antitrust injury on two fronts. First, it contends that the inference of competitive injury

(articulated in *Morton Salt* and *Vanco Beverage*) and the inference of antitrust injury (articulated in *Bigelow* and *Zenith Radio*) do not apply to markets characterized by head-to-head competition in bidding transactions and that a plaintiff in such a market must prove diverted sales in head-to-head competition in specific transactions with favored purchasers to satisfy either element of an RPA damages claim. Second, Volvo contends that evidence of diverted sales cannot be used to prove competitive and antitrust injuries unless a plaintiff can show that it actually made a purchase at the discriminatory price to deliver to a buyer who bought elsewhere.

In addition, Volvo asserts that the Eighth Circuit's holding harms competition by limiting pricing flexibility and suggests that this Court should require proof that price discrimination caused actual harm to competition generally in secondary-line RPA cases.

C. The Heavy-Duty Truck Market

The heavy-duty truck market in the United States is characterized by intense interbrand and intrabrand competition. The major brands of heavy-duty trucks sold in the country include Freightliner, International, Peterbilt, Kenworth, Mack and Volvo. The manufacturer of each brand distributes its trucks through a network of franchised dealers located throughout the country. For example, Volvo had approximately 143 franchised dealers in the United States as of December 2004. Other manufacturers have even more franchised dealers.

Consumers of heavy-duty trucks include owner-operators (individuals who own one or only a few trucks that they drive themselves), small- and medium-fleet owners and large-fleet owners. Many large-fleet owners have terminals at various locations throughout the United States and, as a result, are

physically located near several dealers that represent the same brand. Owner-operators are also exposed to a number of dealers offering the same brand by virtue of the fact that they drive their trucks along major highways where heavy-truck dealers are located and may stop at these dealerships for service, repairs or parts.

There are no significant barriers that prevent a heavy-duty truck buyer from purchasing trucks from any franchised dealer of the same brand throughout the country. Generally, dealers may designate any delivery destination for trucks that have been ordered from the manufacturer and a standard destination charge applies regardless of the distance the vehicle is shipped. Dealers are obligated by their franchise agreements to provide service and repairs for the brand of truck they are franchised to sell regardless of where those trucks were purchased. Because it is profitable, dealers generally welcome the parts and service business of truck owners who purchased their trucks from another dealer. Many large-fleet owners do their own service and repairs for which they must hire and train technicians, buy special tools and equipment, and stock parts for the truck brands that they own.

As a result, heavy-duty truck buyers are not restricted geographically in their truck-purchasing decisions by either cost or the need to reciprocate with the dealer providing most of the service or parts for their trucks. Buyers can, and often do, solicit and accept bids from dealers that are located far from where the buyer is physically located. Dealers are willing, and often seek, to provide bids for new truck sales to buyers located outside the dealer's assigned territory and even in other states. Heavy-duty truck franchise agreements do not prohibit dealers from selling to customers outside the dealer's assigned territory. The Eighth Circuit recognized this reality. *Reeder-Simco*, 374 F.3d at 709;

Pet. App. 11a ("Although Reeder had an assigned geographic area . . . it was free to sell outside that area, and did so.").

Heavy-duty truck buyers, however, do not solicit or accept bids from all potential sellers of trucks. As noted in the dissent in the Eighth Circuit, "[t]he evidence shows than an end user's decision to request a bid from a particular dealer or to allow a particular dealer to bid is controlled by such factors as an existing relationship, geography, reputation, and cold calling or other marketing strategies initiated by individual dealers." *Reeder-Simco,* 374 F.3d at 719 (Hansen, J., dissenting); Pet. App. 28a-29a. Thus, dealers compete in a broad relevant geographic market for the opportunity to provide bids to potential truck buyers.

Heavy-duty truck buyers face switching costs when buying a different brand of truck that they do not own already. In some cases, these costs are significant. For example, when a fleet owner services its own trucks, switching to another brand will require new training for technicians, new special tools and an expanded parts inventories. The need for additional driver training on a new brand and overcoming driver loyalty to the existing brand are additional factors affecting a truck fleet owner's decision whether to switch brands. Because of these switching costs, buyers have an incentive to limit the bids that they solicit to the same brands they own currently. Accordingly, many truck buyers solicit bids from more than one dealer of the same brand in order to create intrabrand price competition, particularly in situations in which the buyer is locked into predominately one brand of truck in its fleet.

Another characteristic of the heavy-duty truck market is that there are a limited number of purchase transactions compared with many other retail markets, such as cars and light trucks. There are fewer potential buyers of heavy-duty trucks than

buyers of cars and light trucks, and heavy-duty truck buyers that operate large fleets tend to purchase large numbers of trucks in a single order and then withhold further large volume purchases (sometimes for several years) until trucks in their fleets need to be replaced. This characteristic tends to magnify the loss of a particular sale to a heavy-duty truck dealer because sales opportunities are limited.

SUMMARY OF ARGUMENT

Reeder proved that it competes in the same relevant market as the price-favored Volvo dealers because heavy-duty truck buyers can turn to any Volvo dealer to solicit bids for new Volvo truck purchases. Competitors in the same relevant market are, by definition, competitors with each other without needing to show head-to-head competition for specific customers in that market.

Competition in the heavy-duty truck market includes competition for the *opportunity* to submit a bid to a particular customer. Price discrimination injures this competition by impairing the disfavored dealer's reputation for offering competitive bids and hindering its ability to implement effective marketing strategies that will persuade truck buyers to seek bids from it in the first instance.

Reeder established that a reasonable possibility existed that Volvo's price discrimination injured its ability to compete with favored Volvo dealers for the opportunity to submit bids for new Volvo trucks in the relevant market and, as a result, Reeder's sales and profits decreased. Reeder proved that the favored Volvo dealers received substantially larger price concessions from Volvo over a significant period of time and that during this time period, its sales and profits decreased while the sales and profits of other dealers increased. In response,

Volvo did not produce evidence that compelled the jury to find that the decline in Reeder's sales and profits was caused by some factor other than Volvo's price discrimination.

Reeder established further that it lost at least one sale of 10 new Volvo trucks in head-to-head competition with another Volvo dealer in which Volvo gave the favored dealer a larger discount than it gave to Reeder. The two-purchase requirement does not prevent this sale from factoring into the determination whether Reeder showed competitive and antitrust injuries. *Reeder-Simco,* 374 F.3d at 708-09; Pet. App. 8a-11a (court discussing two-purchase requirement). Reeder showed that it had purchased trucks from Volvo at prices greater than those paid by favored Volvo dealers in contemporaneous truck sales of like grade and quality. *Reeder-Simco,* 374 F.3d at 710-11; Pet. App. 12a-14a. Having met this element, Reeder should be allowed to rely on evidence of discriminatory price offers to show competitive and antitrust injuries.

The Court should reject Volvo's suggestion that an RPA plaintiff in a secondary-line case must prove harm to competition in general. Such a requirement is contrary to the plain language of the statute and its purpose and history as construed by this Court.

Upholding the RPA violation in this case will not harm competition. Under the RPA, a defendant may assert a meeting-competition defense. *See* 15 U.S.C. § 13(b) ("nothing contained herein shall prevent a seller rebutting the prima-facie case . . . by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor"). This defense would allow Volvo to lower its prices in specific transactions to meet another manufacturer's price concessions without offering that price concession to all dealers. On the other hand, application of the RPA in this case maintains intrabrand

competition among all Volvo dealers in the same relevant market by creating a competitive environment in which truck buyers know that all Volvo dealers compete from the same starting point.

In upholding the jury's determination as to competitive and antitrust injuries, the Eighth Circuit appropriately considered that Volvo used discriminatory pricing as a means to reduce the number of Volvo dealers. Elimination of a dealer obviously injures that dealer's competitive opportunities because it is no longer in business, which, in turn, further reduces intrabrand competition. Finally, the RPA supplements state and federal franchise protection laws that prevent manufacturers from terminating dealers without good cause. By preventing manufacturers from using discriminatory pricing to destroy a dealer's competitive opportunities, the RPA prevents a manufacturer from doing indirectly what the franchise protection laws prohibit it from doing directly.

ARGUMENT

I. NEITHER COMPETITIVE INJURY NOR ANTITRUST INJURY REQUIRES EVIDENCE OF HEAD-TO-HEAD COMPETITION

Volvo contends that Reeder failed to establish competitive and antitrust injuries because it did not show that it competed head-to-head in specific competitive bidding transactions against favored Volvo dealers. However, this contention ignores the fact that Reeder showed head-to-head competition with a favored Volvo dealer in at least two transactions. *Reeder-Simco*, 473 F.3d at 709; Pet. App. 11a-12a. This contention also ignores the fact that Reeder competed against favored Volvo dealers in the relevant market *for the opportunity* to provide bids to Volvo truck buyers and that it is likely that Volvo's

price discrimination substantially injured Reeder's ability to prevail in such competition. Indeed, the limited evidence of head-to-head competition in specific bidding transactions is likely the result of Volvo's discriminatory pricing.

A. Competitive Injury

It is axiomatic that sellers of the same product in the same relevant market are competitors for purposes of antitrust laws. The Court has described the "relevant geographic market" as "the 'area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies.'" *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963) (quoting *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)).

Volvo and its supporting amici curiae have cited no authority (and NADA is aware of none) that requires evidence of direct head-to-head competition between two sellers of the same product in the same relevant geographic market before the sellers can be regarded as competitors. If purchasers can "practicably turn" to either of two sellers to purchase the relevant product, the sellers compete for purposes of antitrust laws. *Id.* Accordingly, competition between disfavored and favored buyers can be established in RPA cases with proof that they compete at the same functional level and in the same relevant geographic market. *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 585 (2d Cir. 1987) (citing FREDERICK M. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 173-80 (1962)).

Reeder established that it competed at the same functional level and in the same relevant market as Volvo's favored dealers. *Reeder-Simco*, 374 F.3d at 709; Pet. App. 11a-12a. Because all Volvo truck dealers sell new Volvo trucks to end

users, they all compete in the same relevant product market. *Id.* The Eighth Circuit held that Reeder permissibly sold outside its assigned geographic area, that retail truck buyers "are very mobile and price-shop nationwide" and that "there were no natural or physical barriers that would restrict the flow of heavy trucks in commerce or affect the freedom of customers to travel throughout the [southwest] region to purchase heavy trucks." *Id.* Thus, the undisputed facts establish that "the area of effective competition" in which Reeder competed and that purchasers can "practicably turn" to buy new Volvo trucks is at least as broad as Volvo's southwest region. Reeder and the favored Volvo dealers are competitors in this relevant market.

Moreover, competition in the relevant market includes competition for the opportunity to provide bids on new heavy-duty trucks to potential buyers. The dissent noted that "[t]he evidence shows that an end user's decision to request a bid from a particular dealer or to allow a particular dealer to bid is controlled by such factors as an existing relationship, geography, reputation, and cold calling or other marketing strategies initiated by individual dealers." *Reeder-Simco*, 374 F.3d at 719 (Hansen, J., dissenting); Pet. App. 28a-29a. Therefore, even the dissent agrees that all Volvo dealers that compete in the relevant geographic market are competitors for the opportunity to submit bids to end users in that market.

It is this opportunity to compete that triggers the injury that Volvo's discriminatory pricing set into motion. A disfavored Volvo dealer whose sales and profits have decreased because of price discrimination relative to a favored Volvo dealer, in turn, will have less capital with which to compete against the favored Volvo dealers for the opportunity to provide bids to end users. A favored Volvo dealer who regularly receives the best-price concessions is likely to earn a reputation for being able to offer the lowest retail price for Volvo trucks and, in turn, will be a

sought-after dealer. In contrast, a dealer who is the victim of significant price discrimination over time will be deprived of opportunities to go head-to-head in bidding against favored Volvo dealers because its "reputation," "cold calling" and "other marketing strategies" will be negatively affected by the discrimination.

This form of competitive injury is no different than that caused by price discrimination in other retail markets. Retailers typically compete through reputation, advertising and other marketing strategies to persuade end users to visit the retailer's store or web site. If price discrimination prevents, for example, a small retail grocer from developing a reputation for offering competitive pricing or from conducting aggressive advertising and other marketing strategies, it will lose sales to end users with whom it never had contact because they will go elsewhere to shop. This is no different from end users of trucks seeking out favored Volvo dealers for bids, instead of disfavored dealers such as Reeder, because of the perception that the favored dealers are more likely to offer a better price because of the favoritism Volvo bestows on them.

As one would expect, proof of head-to-head competition for a specific customer rarely exists in an RPA case. Typically, retailers buy products for resale without identifying the end users to whom they will attempt to resell those products. A small retail grocer, for example, cannot identify the specific end user who did not buy from it because that consumer shopped at a favored grocer that was able to offer lower prices and to more aggressively advertise as a result of the supplier's price discrimination. Likewise, Reeder cannot identify truck buyers that never gave it an opportunity to bid for their business because of Volvo's price discrimination. Having to tie specific purchase transactions to resale attempts to specific customers in head-to-head competition would, as a general rule, create an

insurmountable burden for RPA plaintiffs and tend to render the statute a nullity.

In addition, a requirement of head-to-head competition for specific customers in RPA secondary-line cases is wholly inconsistent with the Court's prior decisions that held that competitive injury will be presumed if the plaintiff shows substantial price discrimination over time and the defendant fails to rebut that presumption. *Vanco Beverage*, 460 U.S. at 435 (citing *Morton Salt*, 334 U.S. at 46). This presumption is based on the principle that the RPA does not require discrimination to have actually harmed competition, but only "a *reasonable possibility* that it *may* harm competition." *Vanco Beverage*, 460 U.S. at 434-35 (emphasis added); *Morton Salt*, 334 U.S. at 46.

In *Morton Salt,* the Court held that the finding of competitive injury was adequately supported by evidence that the seller's discounts resulted in price differentials between competing purchasers sufficient to influence their resale price. 334 U.S. at 47. The Court articulated clearly that a showing of actual financial losses in specific transactions is *not* required in secondary-line RPA cases, as follows:

> The Commission here went much further in receiving evidence than the statute requires. It heard testimony from many witnesses in various parts of the country to show that they had suffered actual financial losses on account of respondent's discriminatory prices. . . . It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to

> the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence.

Id. at 50-51.

Reeder presented evidence of substantial price discrimination over time and a decline in its sales and profits during the period that the discrimination occurred. The favored Volvo dealers sought Volvo's larger price concessions to reduce the prices of the trucks they sold to end users and Volvo provided the concessions for this purpose. *Reeder-Simco*, 374 F.3d at 704; Pet. App. 2a; *see also* Pet. Br. at 3.

The presumption of competitive injury articulated in *Morton Salt* and its progeny allows an RPA plaintiff to establish a prima facie case of competitive injury by showing that substantial price discrimination occurred over time. *Morton Salt*, 334 U.S. at 46-47; *Vanco Beverage*, 460 U.S. 434-35. A defendant may rebut such a prima facie showing with evidence that breaks the causal connection between the price difference and the lost sales or profits. *Vanco Beverage*, 460 U.S. at 434-35. In this case, Volvo's attempt to rebut the *Morton Salt* presumption relies on its contention that Reeder and the favored Volvo dealers did not compete for Volvo truck sales by submitting bids to the same customers. Pet. Br. at 20-21. However, this contention ignores the competition that exists between Reeder and price-favored Volvo dealers in the relevant geographic market for the opportunity to provide bids in the first instance. Volvo and its supporting amici curiae point to no evidence that rebuts the presumption that Volvo's substantial price discrimination over time created a "reasonable possibility" of injury to this competition.

If anything, the limited evidence of diverted sales to favored dealers in specific transactions in which Reeder and a favored dealer submitted bids *supports* the presumption that the price discrimination caused end users to request bids from favored Volvo dealers rather than Reeder.

B. Antitrust Injury

The lack of head-to-head competition in specific transactions between Reeder and Volvo's favored dealers does not preclude a finding of an antitrust injury. In order to recover damages for an RPA violation, a plaintiff must show an antitrust injury, "'which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which made the defendants' acts unlawful.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (quoting *Zenith Radio*, 395 U.S. at 125); *see also* 15 U.S.C. § 15.

To establish an antitrust injury, a plaintiff must prove with reasonable certainty, a causal relation between the defendant's violation and the plaintiff's harm. *Bigelow*, 327 U.S. at 264; *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 561-66 (1931); *Zenith Radio*, 395 U.S. at 114 n.9, 123-24. However, "the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, the defendants' wrongful acts had caused damage to the plaintiffs.'" *Zenith Radio*, 395 U.S. at 123-24 (quoting *Bigelow*, 327 U.S. at 264); *see also J. Truett Payne*, 451 U.S. at 565-66.

The Court has held that "a just and reasonable inference" of an antitrust violation is sufficiently supported by comparing a plaintiff's actual profits with the contemporaneous profits of

competitors not subject to an antitrust violation and by comparing a plaintiff's profits during the time of the violation with the period immediately preceding the violation. *Bigelow*, 327 U.S. at 263-65. In *Zenith Radio*, the plaintiff compared its sales in a territory in which it was affected by the violation with sales in a territory in which it was unaffected, which the Court held was adequate to prove antitrust injury. *Zenith Radio*, 395 U.S. at 124-25; *see also J. Truett Payne*, 451 U.S. at 565-66.

The Eighth Circuit concluded correctly that sufficient evidence existed to show that Reeder had been injured by Volvo's RPA violation based, in part, on Reeder's "evidence that its own sales and profits were substantially reduced during the boom in the heavy truck industry despite an increase in its own sales efforts" during the period of Volvo's price discrimination. *Reeder-Simco*, 374 F.3d at 713; Pet. App. 18a.

Volvo points to no evidence that shows that the contradictory trend in Reeder's sales and profits relative to the industry and other Volvo dealers may have been caused, even in part, by factors other than Volvo's discriminatory pricing. However, even if Volvo had produced such evidence, it would not prevent a finding of antitrust injury because, even though a plaintiff must show that the antitrust violation was a material cause of its injury, it need not rule out all possible alternative sources of injury. *Zenith Radio*, 395 U.S. at 114 n.9, 123-24.

II. DISCRIMINATORY PRICE OFFERS CAN BE USED TO PROVE COMPETITIVE AND ANTITRUST INJURIES

Volvo contends that the "two-purchase" requirement prevents an RPA plaintiff from using discriminatory offers to sell a product to prove the elements of a § 2(a) violation or an antitrust injury. However, the two-purchase requirement is a

jurisdictional element and, once that element has been met, it does not preclude a plaintiff from using the effects of discriminatory price offers to prove competitive and antitrust injuries.

Section 2(a) of the RPA provides in relevant part:

> It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

15 U.S.C. § 13(a). The phrase "between different purchasers" creates a jurisdictional element that requires proof of two actual sales at different prices to two "different purchasers" from the same seller. KINTNER & BAUER, *supra*, § 20.5. Reeder met this burden by showing that, on several occasions, it purchased trucks from Volvo at higher prices than Volvo charged other Volvo dealers in reasonably contemporaneous sales of trucks of like grade and quality.

Volvo contends that only the lost sales and profits tied directly to these discriminatorily priced purchases can be used to prove competitive and antitrust injuries. However, such a conclusion requires the Court to ignore the many other occasions in which Reeder did not purchase trucks because Volvo refused to offer Reeder the same prices that it offered its favored Volvo dealers. No basis exists for this result in the language or history of the statute or in this Court's decisions.

After the jurisdictional elements of a § 2(a) violation have been established, the Court has held that a plaintiff need only show a "reasonable possibility" of competitive harm to establish a prima facie violation. *Morton Salt,* 334 U.S. at 46. In *Morton Salt*, the Court held that it was adequate "in itself" to show "price differentials between competing purchasers sufficient in amount to influence their resale prices of salt" in order to establish that the effect of such price discrimination ""may be substantially to lessen competition . . . and to injure, destroy, and prevent competition."" *Id.* at 47. "Here, the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay." *Id.* at 46.

Offers at discriminatory prices harm a disfavored merchant's "competitive opportunities" as much as actual purchases at discriminatory prices. Such injury is illustrated by the evidence of Volvo's discriminatory price offers to Reeder. Because Volvo refused to offer Reeder the same price discounts that it offered to favored Volvo dealers, Reeder lost competitive bids, which, in turn, precluded it from ordering trucks from Volvo for those particular bid transactions. In these transactions, Reeder suffered competitive injury and lost sales as a result of Volvo's discriminatory pricing regardless whether Reeder purchased trucks at the discriminatory prices that Volvo imposed.

The Court of Appeals for the Fifth Circuit has held that a plaintiff is not bound to purchase the subject commodity at the discriminatory terms "in order to attain the status of a competing purchaser" because "its failure to do so was directly attributable to defendant's own discriminatory practice." *American Can Co. v. Bruce's Juices, Inc.*, 187 F.2d 919, 924 (5th Cir. 1951). However, even if the distinction between price discrimination victims who buy at the higher price and those

who refuse to do so were deemed relevant for determining whether a plaintiff has attained the status of competing "purchaser," it elevates form over substance when examining competitive and antitrust injuries caused by a seller's discriminatory pricing. Unlike the two-purchase requirement, a literal reading of the requirements for competitive injury and antitrust injury do not mandate that a plaintiff's lost sales be tied to actual purchases at the defendant's discriminatory prices.

Indeed, such a requirement would be illogical from an economic viewpoint for the simple reason that lost sales from price discrimination normally will result in the disfavored buyer purchasing less from the discriminating seller. Even in markets not characterized by competitive bidding transactions, substantial price discrimination over time will erode the demand for the disfavored buyer's products and cause it to purchase less from the seller. A small retailer who is the victim of price discrimination by a supplier may see its sales and, consequently, its purchases from the supplier decline. Congress did not intend to preclude a disfavored retailer from showing competitive or antitrust injury because the volume of its purchases were reduced as a result of the seller's price discrimination. Similarly, Congress did not intend to preclude an RPA plaintiff such as Reeder from showing competitive injury because its purchases in competitive bidding transactions, which characterize the heavy-duty truck market, were reduced as a result of Volvo's price discrimination.

In sum, Volvo's interpretation forces price discrimination victims to continue buying products for which there is no demand in order to recover under the RPA. Thus, it penalizes victims for mitigating their damages. Reeder's decision not to purchase trucks after it failed to win a competitive bid because of Volvo's discriminatory pricing was in mitigation of damages, just as a small grocery store mitigates its damages by reducing

its purchases from the supplier whose discriminatory pricing practices causes the store's sales to decline by reducing demand for its over-priced products. Congress never intended to preclude a disfavored buyer that mitigates its damages by reducing discriminatory purchases from using its lost sales and profits that result from discriminatory price offers as evidence of competitive and antitrust injuries.

III. EIGHTH CIRCUIT'S DECISION COMPORTS WITH PURPOSES UNDERLYING THE RPA

A. The RPA Does Not Require Injury to Competition in General in Secondary-Line Cases

Secondary-line RPA violations occur when a seller's price discrimination injures competition among the seller's customers. *Reeder-Simco*, 374 F.3d at 707; Pet. App. 8a. Volvo and its supporting amici curiae suggest that the Court should adopt a new requirement of harm to competition in general in secondary-line cases. However, adopting Volvo's position would require the Court to overturn its own precedent and, even worse, ignore the Court's past interpretations of Congress' intent as to secondary-line RPA cases.

In *Morton Salt,* the Court observed:

> [I]n enacting the Robinson-Patman Act, Congress was especially concerned with protecting small businesses which were unable to buy in quantities, such as the merchants here who purchased in less-than-carload lots. To this end it undertook to strengthen this very phase of the old Clayton Act. The committee reports on the Robinson-Patman Act emphasized a belief that § 2 of the Clayton Act had *'been too restrictive, in requiring a showing of general injury to competitive conditions . . . .' The new provision, here*

> *controlling, was intended to justify a finding of injury to competition by a showing of 'injury to the competitor victimized by the discrimination.'* Since there was evidence sufficient to show that the less-than-carload purchasers might have been handicapped in competing with the more favored carload purchasers by the differential in price established by respondent, the Commission was justified in finding that competition might have thereby been substantially lessened or have been injured within the meaning of the Act.

334 U.S. at 49-50 (ellipses in original; emphasis added).

The competitive injury requirement, as expressly described in § 2(a) of the RPA, can be met by proof that the effect of the discrimination may be: (1) "substantially to lessen competition or tend to create a monopoly in any line of commerce"; *or* (2) "to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ." 15 U.S.C. § 13(a). Harm to competition in general falls under the first alternative. Therefore, an interpretation that competitive injury can be proven with only evidence of harm to competition in general would result in reading the second alternative out of the statute entirely. Regardless how one perceives the wisdom of Congress' desire to protect the competitive opportunities of individual competitors from the adverse affects of price discrimination, the Court is not in a position to render the second alternative a nullity. *See Federal Trade Comm'n v. Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959) ("this Court is not in a position to review the economic wisdom of Congress").

B. Intrabrand Price Competition Protected Without Constraining Interbrand Price Competition

The RPA's meeting-competition defense, 15 U.S.C. § 13(b), gives Volvo the pricing flexibility necessary to match price concessions that competing manufacturers give their dealers. Volvo also may charge different prices when necessary to meet changing market conditions or when justified by cost differentials.

Volvo contends, however, that it needs pricing flexibility beyond that permitted under the RPA defenses. Whether such further pricing flexibility should be allowed must be left to Congress, not the Court. The Court is not in a position to allow price discrimination that violates the RPA because it may have anticompetitive effects in some instances. Moreover, Volvo has not demonstrated that further pricing flexibility is needed to preserve interbrand competition in the heavy-duty truck market.

Volvo's reasons for wanting greater price flexibility include its desire to "offer a larger discount for a retail customer that has historically purchased a different brand of truck" and "offer an even greater discount if that customer is expected to purchase a large number of trucks in the future." Pet. Br. at 3. In other words, Volvo would like to price discriminate against existing Volvo fleet owners and against small fleet owners who cannot be "expected to purchase a large number of trucks in the future." *Id.* However, Volvo has not shown that barring such discrimination injures competition.

In fact, there are ways that Volvo can subsidize a non-Volvo fleet owner's costs of switching to the Volvo brand other than by discriminating in new truck prices against existing Volvo owners. For example, Volvo can charge less for proprietary parts, provide broader warranty coverage or enhance dealer

service training for the benefit of all Volvo truck owners. These steps will increase Volvo truck sales in the long run by inducing non-Volvo fleet owners to switch brands while also retaining current Volvo fleet owners. Discriminating in price against existing Volvo fleets can benefit Volvo only in the short term. Ultimately, such discrimination would cause Volvo and its dealers to lose sales and market share.

Volvo may be able to price discriminate against existing Volvo fleet owners in the short term because of the high costs to switch to another truck brand. As explained earlier, truck fleet owners invest substantial amounts in driver training, repair technician training, repair tools and equipment, and parts and accessories that are specific to the particular truck brand that they currently own. This investment translates into high switching costs for a Volvo fleet owner to change to another truck brand. As a result, Volvo fleet owners may initially tolerate a higher retail price for Volvo trucks when replacing trucks in their fleet than they would for other brands. *See Eastman Kodak Company v. Image Technical Services, Inc.*, 504 U.S. 451, 476 (1992) ("If the cost of switching is high, consumers who already have purchased the equipment, and thus are 'locked in,' will tolerate some level of service-price increases before changing equipment brands.").

In *Eastman Kodak*, the Court recognized that, in markets with high switching costs, intrabrand competition may be necessary to prevent existing brand owners from paying supracompetitive prices for after-market service. *Id.* The same is true for replacement equipment. If Volvo were allowed to "price discriminate between its locked-in customers and potential new customers" as Volvo indicates that it would like to do, effective intrabrand competition is important to mitigate the adverse impact of such discrimination on the locked-in customers. Such competition forces a reduction in dealer

margins that partially compensates for the lower concessions that Volvo is willing to give on sales to locked-in customers.

Eliminating price discrimination among Volvo dealers is conducive to preserving effective intrabrand competition. If only one Volvo dealer were to receive Volvo's best price concession as to a particular Volvo truck owner, other Volvo dealers would be discouraged from seeking to bid for that owner's business. The Eighth Circuit's decision promotes effective intrabrand competition by ensuring an even playing field that encourages Volvo dealers to compete with each other for the opportunity to bid for end-user business. This is consistent with Congress' intent in enacting the RPA, which was "'to provide businesses with equality of opportunity so that they can start the race, the competitive race, on some basis of equality.'" UNITED STATES DEPT. OF JUSTICE REPORT ON THE ROBINSON-PATMAN ACT 145 (1977) (quoting Earl W. Kintner in testimony in *Hearings on H.R. 2384 Before the Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary*, 94th Cong., 1st Sess. 153 (1975)). Such "equality of opportunity" protects not only the individual competitor, but in cases such as this in which intrabrand competition is material to preserving competitive pricing, it benefits competition in general.

C. The RPA Supplements Other Statutes that Protect Dealers from Unfair Treatment by Manufacturers

The Eighth Circuit's decision prevents Volvo from using price discrimination as a way to further injure intrabrand competition by dramatically reducing the number of Volvo dealers in the marketplace. Protecting the competitive interests of individual dealers is consistent with Congress' purpose in enacting the RPA. KINTNER AND BAUER, *supra*, § 19.6 (RPA

prohibits discrimination that results in either injury to competitive conditions or injury to competitors).

By protecting individual competitors, as well as competition in general, the RPA supplements other legislation, such as the Automobile Dealers Day in Court Act ("ADDCA"), 15 U.S.C. §§ 1221-1225, which safeguards individual car and truck dealers "from perceived abusive and oppressive acts by the manufacturers." *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox, Co.*, 439 U.S. 96, 100 (1978). The ADDCA, like the motor vehicle dealer statutes in most states, sets limits on a manufacturer's ability to reduce its dealer count by simply terminating or failing to renew dealer franchise agreements without good cause for doing so. Therefore, the Eighth Circuit's decision prevents a manufacturer from circumventing the ADDCA and state franchise laws by forcing some dealers out of business by charging them discriminatory prices. This application of the RPA is consistent with Congress' intent in protecting small businesses from the superior economic power of their larger suppliers and competitors, which is reflected in the language and history of both the Robinson-Patman Act and Automobile Dealers Day in Court Act.

CONCLUSION

Based on the foregoing reasons and authorities, the National Automobile Dealers Association respectfully requests that the U.S. Supreme Court affirm the judgment of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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